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No. 88-6025

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

REUBEN DOWLING, PETITIONER

v.

UNITED STATES OF AMERICA
AND
GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether it was reversible error for the trial court to admit evidence, in petitioner's trial for offenses arising out of a bank robbery, of another similar robbery of which petitioner had been acquitted in an earlier trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 855 F.2d 114.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1988. A petition for rehearing was denied on September 28, 1988. The petition for a writ of certiorari was filed on November 28, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the District Court of the Virgin Islands, petitioner was convicted on one count of bank robbery, in violation of 18 U.S.C. 2113(a); two counts of first-degree robbery, in violation of V.I. Code Ann. tit. 14, §1862(2) (1987 Supp.); two counts of third-degree assault, in violation of V.I. Code Ann. tit. 14, §297(2); one count of grand larceny, in

violation of V.I. Code Ann. tit. 14 §1083(1); and one count of unauthorized use of a vehicle, in violation of V.I. Code Ann. tit. 14, §1382. Petitioner was acquitted of armed robbery, in violation of 18 U.S.C. 2113(d); and illegal possession of a firearm during the commission of a violent crime, in violation of V.I. Code Ann. tit. 14, §§2253(a), 2254. He was sentenced to 70 years' imprisonment.

1.a. The evidence at trial showed that on the afternoon of July 8, 1985, a man armed with a pistol and wearing a ski mask robbed the First Pennsylvania Bank in Frederiksted, St. Croix. The ski mask was a blue or black woven mask with two holes cut out for the eyes, and the pistol was a small caliber handgun. The robber took approximately $7000 from the cash drawers of two tellers, and then ran from the bank to a parking lot across the street. After running around and apparently looking for something, the robber returned to the middle of the street and, pointing a gun, commandeered a passing taxi van. Following a brief struggle with the taxi driver, the robber drove away in the van and took off his mask. Pet. App. A2-A3, A19-A20.

Antonio Messer, who had been in the bank but had managed to slip out during the robbery, observed the robber's getaway. He was approximately 15 feet away from the robber as he drove past, and he got a good look at the robber's face. Messer then pursued the van in his own vehicle. At trial, Messer identified petitioner as the robber. Pet. App. A3, A18-A19.

About a mile outside of Frederiksted, the robber drove the van into the front yard of Hayde Pichardo, who was watching from her bedroom window. Pichardo became upset because her young children were playing in the front yard, and she shouted an obscenity at the driver of the van. She got a good look at the driver's face when he stopped the van and stuck his head out the window to see who had shouted at him. Amada Rosario, Pichardo's 17-year old daughter, was also watching out the window, and she

saw the driver's face as he slowed down and put his head outside. At trial, both Pichardo and Rosario identified petitioner as the driver. Pet. App. A3, A18-A19.

A number of witnesses testified that the robber was tall, fit, and athletically built, and an FBI agent estimated, based upon bank security photographs, that the robber was probably at least six feet tall. The jury was able to compare petitioner's physique to these characteristics. Pet. App. A3, A18-A19.

Messer and other witnesses to the robbery testified that the robber had been dressed in a green army shirt. A police official testified that on the morning of the robbery he had seen a white Volkswagen stalled by the side of the road occupied by a man wearing a green army shirt and the same kind of hat from which the robber's mask was made. Petitioner had borrowed this Volkswagen the day before. At about the time of the robbery, a second officer saw a white Volkswagen parked near the bank with its front door open. The occupants of the car were Delroy Christian and a second individual. The officer told them to close the door, and they drove away. The officer followed the car for about a mile before turning around. Shortly thereafter, the officer received a radio report about the bank robbery. Pet. App. A20.

b. At trial, the government also offered testimony, pursuant to Fed. R. Evid. 404(b), that petitioner and Christian had committed another robbery two weeks after the bank robbery. The theory on which the evidence was offered was that the two robberies had similar features that justified the inference that petitioner had been the bank robber. Vena Henry testified that a man -- carrying a small handgun (which was similar to the one used in the bank robbery), wearing a brown knitted ski mask with eye holes, and accompanying Christian -- had broken into her home in Frederiksted on July 28, 1985. During the ensuing struggle, Henry pulled the ski mask off the robber and saw the robber's

face. At the trial for the bank robbery, she identified petitioner as the individual who had broken into her home with Christian. Pet. App. A12. The district court admitted this evidence after determining, by "clear and convincing evidence," that it fell "within the ambit of" Rule 404(b) of the Federal Rules of Evidence and that "it was more probative than prejudicial." C.A. App. 160A.

In connection with the incident at Henry's house, petitioner was charged under territorial law with burglary, attempted robbery, assault, and weapons offenses. He was tried for and acquitted of those offenses before his trial for the bank robbery began. Pet. App. A12.

2. The court of appeals affirmed petitioner's conviction on the offenses arising from the bank robbery (Pet. App. A1-A22). After rejecting several other claims of error, it ruled that Vena Henry's testimony concerning the robbery of her home should have been excluded from evidence (id. at A12-A17). However, the court also determined that this error, which it did not find to be of constitutional magnitude, was harmless (id. at A17-A22).

a. The court cited two alternative grounds for its conclusion that Henry's testimony should have been excluded:

First, relying on its decision in United States v. Keller, 624 F.2d 1154 (3d Cir. 1980), the court held that petitioner's acquittal of the charges arising from the robbery at Henry's house collaterally estopped the government from offering evidence of that incident in petitioner's bank robbery trial. The court noted that Keller had referred to "the constitutional doctrine of collateral estoppel included in the Fifth Amendment's double jeopardy clause," but determined that the case's holding was based instead on case law from the Circuit that "'consistently applied [the doctrine of collateral estoppel] to bar the evidentiary use of crimes for which the defendant was

acquitted'" (id. at A13 (quoting United States v. Keller, 624 F.2d at 1160)).1/

Second, the court held (Pet. App. A16-A17) that the evidence was inadmissible under the Federal Rules of Evidence. Relying on Huddleston v. United States, No. 87-6 (May 2, 1988), the court found that the robbery of Henry's house was not admissible under Rule 404(b) because "when the prior act sought to be introduced was the subject of an acquittal by a jury, the second jury should not be permitted to conclude 'that the act occurred and that the defendant was the actor'" (Pet. App. A16 (quoting Huddleston v. United States, slip op. 8)). Even if Huddleston did not require exclusion of the evidence, the court of appeals continued, the prior acquittal had to be taken "to signify that it was not proven that [petitioner] committed the 'bad' act charged" and thus "the marginal relevance of the evidence was more than amply outweighed by the potential prejudice" (Pet. App. A17). See Fed. R. Evid. 403.

1/ The court rejected the government's argument that the doctrine of collateral estoppel did not apply because the facts for which the prosecution had introduced evidence of the Henry incident in this case -- that petitioner had accompanied Christian to Henry's house wearing a knitted ski mask (of a type rarely sold in that tropical locale) and carrying a small handgun of the type used in the bank robbery -- were not necessarily determined in petitioner's favor by his acquittal. Pet. App. A13-A16. The government maintained that, because Christian had testified during the first trial that he and petitioner had been in Henry's house, but for the purpose of collecting a debt, as opposed to robbing her, the jury's acquittal reflected its acceptance of this characterization of the incident, as opposed to a finding that someone other than petitioner had participated in the incident at Henry's house (Govt. C.A. Br. 23). The district judge, who had presided over both trials, observed that "[petitioner's] presence in the house was not seriously contested in the case" arising from the incident at Henry's house, but added that petitioner had "stated the general defense" and had not taken the stand (id. at A15). Placing the burden of proof on this issue on the government, the court of appeals found "an insufficient basis on which to conclude that the issue of [petitioner's] participation in the robbery was not determined" in the first trial (ibid.).

In our view, the court of appeals mistakenly placed the burden of proof on the government on this issue. See, e.g., United States v. Gentile, 816 F.2d 1157, 1162 (7th Cir. 1987); United States v. Citron, 853 F.2d 1055, 1058 (2d Cir. 1988).

b The court of appeals ruled, however, that the admission of Henry's testimony was harmless error. Stating that it "need not in this case be convinced that the error was harmless beyond a reasonable doubt," the court applied its "high probability" standard of review for errors that have not affected a constitutional right (Pet. App. A17-A18). The court explained that this "high probability" standard required it to "have a 'sure conviction that the error did not prejudice the defendant,'" but not to "disprove every 'reasonable possibility' of prejudice" (id. at A18 (quoting United States v. Grayson, 795 F.2d 278, 290 (3d Cir. 1986), cert. denied, 481 U.S. 1018 (1987)).

In applying this standard, the court of appeals joined in the trial court's characterization of the evidence against petitioner as "overwhelming" (Pet. App. A18). The court noted that there were "three positive identifications" of petitioner, and emphasized the certainty with which the witnesses had expressed themselves (id. at A18-A19). These identifications were buttressed, the court continued, by numerous witnesses' descriptions of the robber and a "strong circumstantial case" (id. at A19). On the day of the bank robbery a man fitting the robber's description had been seen in a Volkswagen which petitioner had borrowed. There was also evidence that this Volkswagen was to have been the getaway car for the robbery, before its occupants drew the attention of the police and moved on, forcing the robber to commandeer a taxi van. Id. at A19-A20.

The court of appeals also noted that the district court had instructed the jury of the "limited value" of testimony regarding the incident at the Henry house and of petitioner's acquittal of charges arising from it (Pet. App. A21). Further, because evidence of a prior felony conviction was lawfully introduced to impeach petitioner, the court found that "it is unlikely that the

admission of the Henry testimony more than marginally affected the jury's overall character assessment of [petitioner]" (ibid.).

In light of its "review of the entire record," the court of appeals concluded that "there is a 'high probability' that the error in admitting the Henry testimony did not prejudice [petitioner]" (Pet. App. A21).

ARGUMENT

Petitioner contends that the admission of evidence of the robbery at the Henry house violated his constitutional rights. Accordingly, he asserts that the court of appeals should have applied the harmless error standard that it applies to constitutional claims. He also argues that, in the course of determining which harmless error standard is applicable to this case, this Court could resolve a conflict among the courts of appeals as to the admissibility of evidence of other alleged offenses of which the defendant has previously been acquitted. Pet. 5-11. We agree that, in light of the importance of the issues presented in this case, further review is warranted.

1. As petitioner points out, the courts of appeals are in conflict as to whether the government may introduce evidence of an offense of which a defendant has been acquitted to prove a different offense in a later trial. Typically, such evidence is offered under Rule 404(b), Fed. R. Evid., or an analogous state rule of evidence. The Second, Third, Fifth, Sixth, Eleventh and District of Columbia Circuits have taken the position that the prior acquittal estops the government from introducing evidence of facts that were necessarily determined in the prior trial. United States v. Mespoulede, 597 F.2d 329, 332-336 (2d Cir. 1979); United States v. Keller, 624 F.2d at 1157-1160; United States v. Mock, 604 F.2d 341, 343-344 (5th Cir. 1979); Wingate v. Wainwright, 464 F.2d 209, 211-215 (5th Cir. 1972); United States v. Johnson, 697 F.2d 735, 739-741 (6th Cir. 1983); Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984); United States v. Day,

591 F.2d 861, 868-869 (D.C. Cir. 1978). The Second, Fifth, Eleventh, and D.C. Circuits rely on the Double Jeopardy Clause, as construed in Ashe v. Swenson, 397 U.S. 436 (1970), and, in some cases, "fundamental considerations of fair play" or "basic concepts of justice." United States v. Mespoulede, 597 F.2d at 334-335; Wingate v. Wainwright, 464 F.2d at 212-215; Albert v. Montgomery, 732 F.2d at 869-870. The Third and Sixth Circuits have ruled that the doctrine of collateral estoppel, in its nonconstitutional sense, forecloses the admission of this type of evidence. The Eighth, Ninth and Tenth Circuits do not view an acquittal as a bar to evidence of the defendant's participation in other offenses that is otherwise admissible under applicable rules of evidence. United States v. Riley, 684 F.2d 542, 545-546 (8th Cir. 1982), cert. denied, 459 U.S. 1111 (1983); United States v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977); United States v. Castro-Castro, 464 F.2d 336 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973); United States v. Van Cleave, 599 F.2d 954, 957 (10th Cir. 1979); Holt v. United States, 404 F.2d 914 (10th Cir. 1968), cert. denied, 393 U.S. 1086 (1969).2/

The court of appeals' conclusion that the doctrine of collateral estoppel requires exclusion of evidence that is otherwise admissible under Rule 404(b) is also in conflict with the reasoning of recent decisions of this Court. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); Huddleston v. United States, No. 87-6 (May 2, 1988). In 89 Firearms, this Court held that a defendant's acquittal on charges of illegally selling firearms did not bar a subsequent action seeking forfeiture of firearms seized from the defendant. Collateral estoppel was inapplicable, the Court explained, because of "the difference in the relative burdens of proof in the criminal and

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2/ State courts have also reached varying conclusions as to the admissibility of this type of evidence. See Annotation, Admissibility of Evidence As To Other Offense As Affected By Defendant's Acquittal of That Offense, 25 A.L.R. 4th 934.

civil [forfeiture] actions." 465 U.S. at 362. An acquittal of criminal charges represents only "an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." Helvering v. Mitchell, 303 U.S. 391, 397 (1938). Accord 89 Firearms, 465 U.S. at 359, 361-362; One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1973). See United States v. Hogue, 812 F.2d 1568, 1578 (11th Cir. 1987). Thus, an acquittal does not negate the possibility that the facts "determined" in the criminal case -- in the sense of not being proved to a jury's satisfaction beyond a reasonable doubt -- will nevertheless be established by a lower standard of proof in a subsequent proceeding governed by that lower standard. 89 Firearms, 465 U.S. at 362.2/

Huddleston makes clear in turn that the admissibility of evidence under Rule 404(b) is not dependant on proof of "conditional facts" beyond a reasonable doubt. In that case, the Court held that a trial court need not make a preliminary finding that the government has proved other similar acts by a preponderance of the evidence before admitting evidence of those acts for a purpose permitted by Rule 404(b). Rather, the Court concluded that such evidence is "subject only to the general strictures" of Rules 402 and Rule 403. Under these rules, all "relevant evidence" -- that is, "evidence having any tendency to

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2/ In 89 Firearms, the Court disapproved the statement in Coffey v. United States, 116 U.S. 436, 443 (1886), that an acquittal of criminal charges was "conclusive" in a subsequent forfeiture proceeding as to "the existence of the same act or fact" in issue in the criminal case. See 465 U.S. at 358, 361. The starting point for the application of collateral estoppel to evidence of other crimes has been a similar misconception as to the effect of an acquittal. See, e.g., United States v. Keller, 624 F.2d at 1157 (prior judgment of acquittal is "conclusive as to all the judgment determined" (quoting United States v. DeAngelo, 138 F.2d 466, 468 (3d Cir. 1943)); United States v. Mespoulede, 597 F.2d at 333 (construing acquittal of drug possession charge as determination that defendant did not possess the drugs in issue); Wingate v. Wainwright, 464 F.2d at 214 (prosecution may not "relitigate an issue which was determined in a prior prosecution of the same parties"). See also J. Weinstein & M. Berger, Weinstein's Evidence, para. 404[10] at 404-74, 803(22)[01] at 803-260 n.48 (1988 ed).

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (Fed. R. Evid. 401) -- is admissible unless its prejudicial effect outweighs its probative value. Thus, when presented with a dispute over a fact bearing on the relevance of evidence offered in accordance with Rule 404(b), a trial court "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact * * * by a preponderance of the evidence." Huddleston, slip op. 9.4/

Obviously, a jury's determination that the government has not proved beyond a reasonable doubt that a defendant committed an offense does not foreclose a judge from later finding that evidence of the defendant's actions satisfies the lower standard prescribed by the Rules of Evidence. In this respect, the second determination is indistinguishable from the use of evidence in a forfeiture proceeding of the type involved in 89 Firearms. In terms of this case, the district judge was not foreclosed by petitioner's prior acquittal from determining that the jury could reasonably find, by a preponderance of the evidence, that petitioner had engaged in a robbery at Henry's home and that the similarities between the circumstances surrounding that robbery and the bank robbery tended to make it more probable that petitioner was the bank robber. Cf. Smith v. Wainwright, 568 F.2d 362, 364 (5th Cir. 1978) (analyzing burdens of proof where acquittal of other offense followed conviction based on its use as "other crime" evidence). Giving meticulous attention to Rules 403 and 404(b), the district court admitted the evidence only after making a finding that the evidence was probative, under a

4/ There is no anomaly in admitting evidence that a jury may find probative only by a preponderance of the evidence to prove guilt beyond a reasonable doubt. "[I]t is not to be supposed that every witness can make a home run." Notes of Advisory Committee on Proposed Fed. R. Evid. 401, quoting Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 576 (1956).

standard higher than that mandated by Huddleston, and determining that the evidence was more probative than prejudicial. See C.A. App. 143A-160A. Contrary to the court of appeals' opinion, therefore, petitioner's acquittal, if given the preclusive effect due under 89 Firearms, should not have rendered inadmissible the evidence that petitioner had participated in a robbery at Mrs. Henry's home.5/

In short, the court of appeals' conclusion that the evidence of petitioner's participation in a robbery at Henry's house was inadmissible conflicts with the decisions of other courts of appeals and the reasoning of decisions of this Court. As the reported decisions reflect, the issue frequently arises in both state and federal courts. Evidence offered under Fed. R. Evid. 404(b) is often helpful to factfinders in criminal cases. The exclusion of such evidence, on grounds inconsistent with the decisions of this Court and principles of collateral estoppel, raises questions that warrant this Court's review.

2. Since the court of appeals expressly passed upon the admissibility of evidence of the Henry robbery under the doctrine of collateral estoppel and the Rules of Evidence, the Court could appropriately address those issues. However, since the court of appeals also held that the admission of Henry's testimony was harmless error under the standard that it applies to

5/ As alternative bases for its holding, the court of appeals determined that evidence of the Henry robbery was inadmissible under Rule 404(b) and was an abuse of discretion under Rule 403. Both conclusions, however, were premised on the court's mistaken view of the preclusive effect of the acquittal in the prior case. With respect to Rule 404(b), the court of appeals said petitioner's acquittal foreclosed a subsequent jury from making the finding required by Huddleston (Pet. App. A16), thereby ignoring the difference in the applicable burdens of proof. Similarly, in striking the balance between probative value and prejudice required by Rule 403, the court stated that the prior jury's not guilty verdict "must be taken to signify that it was not proven that [petitioner] committed the 'bad' act charged" (Pet. App. A17), a view that is flatly inconsistent with 89 Firearms. Apart from the court of appeals' mistaken view of the effect of petitioner's acquittal, therefore, the district court's decision to admit the evidence was not an abuse of its discretion under the Rules.

nonconstitutional claims,[6] it would not be strictly necessary to reach the question whether the evidence should have been excluded on nonconstitutional grounds. Nevertheless, even if this case were viewed as raising only the question whether the Double Jeopardy Clause prohibits evidence of an offense of which a defendant has been acquitted, it would still present an opportunity for this Court to resolve an important issue on which the courts of appeals are in conflict as to the meaning of a decision of this Court.

As we noted above, four of the six Circuits that have concluded that an acquittal bars use of evidence of an offense of proof of guilt of another offense -- the Second, Fifth, Eleventh, and District of Columbia Circuits -- have rested their decisions on the Double Jeopardy Clause, as construed in Ashe v. Swenson, supra. These decisions are in conflict with the decisions of the two courts of appeals that have reached the same result on nonconstitutional grounds, the Third and Sixth Circuits, as well as the decisions of those courts of appeals that reject the view that acquittal bars evidence otherwise admissible under Rule 404(b), the Eighth, Ninth, and Tenth Circuits. See pp. 7-8, supra. There is thus a significant conflict among the courts of appeals on the constitutional issue raised by this case.

If evidence of "other crimes" of which the defendant has been previously acquitted is inadmissible, the question whether such an error is of constitutional or nonconstitutional dimension is important for two reasons. First, it may dictate whether

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[6] We believe that the evidence in this case, which both lower courts characterized as "overwhelming" (Pet. App. A18), and other circumstances relied upon by the court of appeals (id. at A17-A22) would justify the conclusion that any error in admitting the evidence of the Henry robbery was harmless beyond a reasonable doubt within the meaning of Chapman v. California, 386 U.S. 18 (1967). However, the court of appeals expressly reserved that issue. If this Court agreed with petitioner as to the inadmissibility of the evidence and the appropriate harmless error standard, the Court would have the option of resolving that issue itself or remanding the case to the court of appeals so that it could make that determination. See United States v. Lane, 474 U.S. 438, 450 (1986).

errors of this type are subject to review on collateral attack of state court convictions in federal habeas corpus proceedings. Second, the nature of any such error has been regarded as dictating the harmless error standard that courts of appeals must use in determining whether the error requires reversal in a particular case. If any such error is constitutional in nature, as the Second, Fifth, Eleventh, and District of Columbia Circuits have held, the courts have applied the harmless error standard articulated in Chapman v. California, 386 U.S. 18 (1967), i.e., whether the error has been shown to be harmless beyond a reasonable doubt. If any such error is nonconstitutional in nature, as the Third and the Sixth Circuits have held, the courts have held that the applicable standard is the more lenient one drawn from Kotteakos v. United States, 328 U.S. 750 (1946), i.e., whether the error had a substantial influence on the outcome of the case.

Contrary to the view of the Second, Fifth, Eleventh, and District of Columbia Circuits, Ashe v. Swenson, supra, does not support the conclusion that the Double Jeopardy Clause prohibits the introduction of evidence of an offense of which the defendant has been acquitted. In that case, Ashe was charged with robbing Knight, one of six persons held up during a poker game, and was acquitted. The state then charged Ashe with robbing another member of the same game, and obtained a conviction. This Court reversed the conviction, holding that the doctrine of collateral estoppel, which the Court concluded was embodied in the Double Jeopardy Clause, barred relitigation of whether Ashe was one of the robbers. The Court explained (397 U.S. at 445 (emphasis added)):

> the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. [Collateral estoppel], therefore, would make a second

> prosecution for the robbery * * * wholly impermissible.

Ashe thus held that the collateral estoppel doctrine incorporated in the Double Jeopardy Clause bars a successive prosecution of a defendant where a prior acquittal necessarily determines in the defendant's favor a fact which, in the subsequent prosecution, must be proved beyond a reasonable doubt.7/ Ashe does not suggest, however, that the government is precluded in a subsequent prosecution from introducing evidence of a defendant's participation in an offense, for the purposes permitted by Fed. R. Evid. 404(b), to prove a separate offense not inconsistent with the prior acquittal.8/

Therefore, as we view this case, it presents two questions on which the courts of appeals are divided and which warrant this Court's review: whether evidence that has resulted in an acquittal is inadmissible for any purpose at a later trial and, if so, whether the improper admission of such evidence is constitutional or nonconstitutional error. Of course, if the Court concludes, as we submit, that the evidence in this case was admissible, the judgment below can be affirmed without reaching the second issue. But if the Court agrees with the Third Circuit that the evidence was inadmissible, the Court will be faced with the question whether that result is required by the Constitution,

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7/ See Blackburn v. Cross, 510 F.2d 1014, 1017 (5th Cir. 1975) (applying collateral estoppel to "evidentiary facts" "significantly expanded the Ashe holding").

8/ Petitioner suggests that, apart from the Double Jeopardy Clause, the Due Process Clause may prohibit use of evidence of a prior offense of which a defendant has been acquitted for the purposes permitted by Rule 404(b). See Pet. 8. While some courts have invoked "fundamental considerations of fair play" (United States v. Mespoulede, 597 F.2d at 334) or "basic concepts of justice" (Wingate v. Wainwright, 464 F.2d at 215) to justify exclusion of such evidence, it cannot fairly be suggested that the Constitution goes farther than the doctrine of collateral estoppel in this area. Indeed, in Hoag v. New Jersey, 356 U.S. 464, 471 (1958), a decision rendered before the Double Jeopardy Clause was held applicable to state prosecutions, the Court affirmed a conviction on facts that were very close to those in Ashe v. Swenson and expressed "grave doubts whether collateral estoppel can be regarded as a constitutional requirement."

and thus whether the Third Circuit applied the correct harmless error standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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